law.

II. Beehive's Claims Should Not Be Referred to the FCC

The doctrine of primary jurisdiction allows a federal court to refer a matter extending beyond the "conventional experience of judges" or "falling within the realm of administrative discretion" to an administrative agency with more specialized experience, expertise, and insight. Far East Conference v. United States, 342 U.S. 570, 574 (1952). Specifically, courts apply primary jurisdiction to cases involving technical and intricate questions of fact and policy that Congress has assigned to a particular agency. See, National Communications Associations, Inc. v. AT&T, 46 F.3d 220, 223 (2d Cir. 1995).

No fixed formula has been established for determining whether an agency has primary jurisdiction. See, United States v. Western Pacific Railroad Co., 352 U.S. 59, 65 (1965). However, 3 factors have been the focus of analysis: (1) whether the issues of fact raised in the case are not within the conventional experience of judges; (2) whether the issues of fact require the exercise of administrative discretion, or require uniformity and consistency in the regulation of business entrusted to a particular agency; and (3) whether there is the potential for inconsistent rulings by the district court and the agency. See, e.g., Mical Communications v. Sprint Telemedia, 1 F.3d 1031, 1036 (10th Cir. 1993). The court also must balance the advantages of applying the doctrine against the potential costs resulting from complications and delay in the administrative proceedings. See, e.g., Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 321 (1973).

Beehive will show that the issues presented by its claims are not appropriate for

referral to the FCC.

A. Telecom Act Claims

Beehive's Telecom Act claims (Counts I, II, and III of the Amended Counterclaim) do not present issues of fact. The issues are purely legal. It is well established that the courts need not resort to an agency "where the issue involved is a strictly legal one, involving neither the agency's particular expertise nor its fact finding prowess." Board of Education v. Harris, 622 F.2d 599, 607 (2d Cir. 1979), cert. denied, 449 U.S. 1124 (1981). See, National Communications, 46 F.3d at 223; FTC v. Feldman, 532 F.2d 1092, 1096 (7th Cir. 1976).

DSMI effectively concedes that Beehive's Telecom Act claims do not present issues of fact or require an interpretation of the SMS/800 Tariff which "might need the FCC's technical or policy expertise." National Communications, 46 F.3d at 223. Noting that there have been few judicial interpretations of the Telecom Act, because it is "so new," DSMI simply contends that "the FCC should have the opportunity to render the initial interpretation of the statute it is charged to administer." DSMI Memorandum, at 26. However, the Court does not need FCC assistance to construe the Telecom Act; the FCC already has spoken on section 251 of the Telecom Act, and Congress has not charged the FCC exclusively with administering section 251.

As DSMI implicitly admits, Beehive's Telecom Act claims present legal issues of statutory construction. Count I turns entirely on whether the SMS/800 is considered a

"network element" under the Telecom Act definition. See, 47 U.S.C. section 153(29).* Count II calls on the Court to determine whether DSMI is an "impartial entity" under the statute. See, 47 U.S.C. section 251(e)(1). And Count III requires the Court to construe the "competitively neutral basis" language of section 251(e). See, 47 U.S.C. section 251(e). Primary jurisdiction does not extend to these Telecom Act issues.

Statutory construction is manifestly "within the conventional competence of the courts." Trans-Allied Audit Co., Inc. v. Ram Trans., Inc., 760 F. Supp. 848, 851 (D. Col. 1989) (quoting Nader v. Allegheny Airlines, 426 U.S. 290, 305 (1976)). See, Barlow, 397 U.S. at 166; Morrell v. Harris, 505 F. Supp. 1063, 1068 (E.D. Pa. 1981). The Court is clearly competent to determine, for example, whether DSMI's description of the SMS/800 as a "database" containing information for the billing and routing of 800 calls fits the statutory definition of a network element. See, Complaint, para. 6. The Court need not defer to the FCC to construe the relevant Telecom Act provisions, especially since the FCC already has done so.

The FCC implemented section 251 of the Telecom Act in August, 1996, and it exercised its expertise to rule that call-related databases (including the "toll-free calling databases"), and SMSs are network elements. See, 47 C.F.R. sections 51.319(e)(2) and (3); Interconnection Order, 4 Com. Reg. (P&F), at 133-134 and 136. The FCC also ruled that nondiscriminatory access to such databases and SMSs must be provided as required by sections 251 and 252 of the Telecom Act. See, 47 C.F.R. section 51.307(a);

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* See, supra, at note 2 and accompanying text.

Interconnection Order, 4 Com. Reg. (P&F), at 68-69. In effect, the FCC has confirmed what Congress made clear – access to the SMS/800 must be provided in accordance with sections 251 and 252 of the Telecom Act.

The Court should be "very reluctant" to refer a legal question to the FCC when the FCC already has spoken on the issue and its position is "sufficiently clear." Gillett Communications of Atlanta, Inc. v. Becker, 807 F. Supp. 757, 761 (N.D. Ga. 1992) (quoting Mississippi Power & Light v. United Gas Pipe Line, 532 F.2d 412, 419 (5th Cir. 1976)). The FCC has spoken with sufficient clarity to establish its position with respect to the status of the SMS/800 under the Telecom Act. The Court simply can adopt "the [FCC's] position, finding it sound as a matter of statutory construction." Id. at 761. If so, it must issue the declaratory judgment that access to the SMS/800 must be pursuant to a state-approved agreement, not under the federal SMS/800 Tariff.

A referral to the FCC also is inappropriate because the FCC lacks primary jurisdiction under sections 251 and 252 of the Telecom Act. The FCC's role in administering the local competition provisions of sections 251 and 252 is clearly subordinate to that of state commissions. Congress only gave the FCC the authority to "establish regulations to implement the requirements" of section 251. See, 47 U.S.C. section 251(d)(1). However, state commissions were empowered to mediate, arbitrate, and approve access agreements for network elements, see 47 U.S.C. sections 252(a) and (e), to adopt arbitration standards (including rates for network elements), see 47 U.S.C. section 252(c), to determine pricing standards on network elements charges, see 47 U.S.C. section

252(d), and to enforce state standards in the approval of inter-carrier agreements, see 47 U.S.C. section 252. Because the regulation of SMS/800 access is not "entrusted to a particular agency," see, Nader, 426 U.S. at 303-304, a referral to the FCC is not essential to secure uniformity in its regulation of telecommunications. See, National Communications, 46 F.3d at 224-225.

Finally, there is a need to resolve the Telecom Act issues quickly and fairly. Resolution of the issues already is overdue. The FCC should have implemented section 251 by August 8, 1996. Further delay will deny Beehive access to the "800" numbers it needs to compete in the "800" service market. Moreover, if delay stretches to the end of this year, the sale of Bellcore (DSMI's parent) by the BOCs further may interrupt and forestall a resolution of the issues, thereby prolonging regulatory uncertainty. See, DSMI Memorandum, at 4 n. 5. Under these circumstances, the fair administration of justice weighs substantially against referral.

B. The Section 201(a) Claim

Primary jurisdiction does not apply to cases involving the enforcement of an FCC tariff, as opposed to a challenge to the reasonableness of the tariff. See, National Communications, 46 F.3d at 223. Accordingly, the doctrine does not apply to Beehive's "refusal-to-serve" claim under section 201(a) of the Act, 47 U.S.C. section 201(a). The Court can enforce the SMS/800 Tariff to the extent of ordering DSMI to reinstate Beehive as a RespOrg.

Without conceding the legality of the SMS/800 Tariff, Beehive formally applied to

be reinstated as a RespOrg on June 12, 1996. DSMI refused to provide service in large part because Beehive allegedly failed to furnish information concerning its insurance coverage.[10] On October 28, 1996, the FCC struck down the insurance requirements of the SMS/800 Tariff as violating section 201(b) of the Act, 47 U.S.C. section 201(b). See, 800 Data Base Access Tariffs, 4 Com Reg. (P&F), at 1333. And DSMI now admits that Beehive is qualified to be a RespOrg. See, DSMI Memorandum, at 13 n. 13. Therefore, the Court may issue the declaratory ruling that Beehive is entitled to be served under the SMS/800 Tariff. The Court does not need the FCC's technical or policy expertise to render that judgment. See, National Communications, 43 F.3d at 223-224.

C. The Count VI Claim

On the same reasoning which governs disposition of the section 201(a) claim, the Court may resolve the Count VI claim without referral to the FCC. This claim merely asks the Court to enforce the SMS/800 Tariff by its terms, not to determine the reasonableness of the Tariff. For purposes of argument, and without conceding the validity of the SMS/800 Tariff, Count VI takes that Tariff at face value, including the alleged "non-proprietary" assignment of "800" numbers to Beehive. It merely asks the Court, likewise, to take the Tariff at face-value, including those terms of the Tariff which require notice, negotiation, and hearing, before DSMI may repossess numbers or otherwise terminate the access and service relationship between DSMI and customers such as

[10] See, Affidavit of Barbara Devlin, at 2 (September 2, 1996).

Beehive. This is not a complicated issue requiring agency expertise. It simply calls for a determination whether DSMI obeyed these simple procedures in the SMS/800 Tariff before it dispossessed Beehive of the "800" numbers.

The Count VII Claim

In this claim, Beehive alleges that DSMI violated the Fifth Amendment due process clause, given the manner in which DSMI repossessed the "800" numbers formerly held by Beehive. There can be no question that the resolution of Fifth Amendment claims is the bailiwick of this Court, rather than the FCC. Moreover, Beehive may be entitled to a trial by jury respecting this claim, and this important constitutional right would be lost if these issues were referred for adjudication to the FCC.

III. The Court Should Stay This Case If It Refers Issues To the FCC

DSMI seems to request that this case be stayed, not dismissed, if the Court decides to refer issues to the FCC. See, DSMI Motion to Dismiss, at 1; DSMI Memorandum, at i. Beehive concurs with the following provisos.

Under the doctrine of primary jurisdiction, "the judicial process is suspended pending referral of the issues to the administrative body for its views." Mical, 1 F.3d at 1038 (quoting Marshall v. El Paso Natural Gas Co., 874 F.2d 1373, 1376 (10th Cir. 1989)). Therefore, if it decides to refer the amended counterclaim to the FCC, the Court should stay (or suspend) this case, not dismiss it. See, IPCO Safety Corp. v. Worldcom, Inc., 944 F. Supp. 352, 357 (D. N.J. 1996); AT&T Corp. v. PAB, Inc., 935 F. Supp. 584, 591 (E.D.

Pa. 1996); AT&T Co. v. MCI Communications Corp., 837 F. Supp. 13, 17 (D.D.C. 1993); Vortex Communications, Inc. v. AT&T Co., 828 F. Supp. 19, 20 (S.D.N.Y. 1993); Southwestern Bell Telephone Co. v. Allnet Communications Services, Inc., 789 F. Supp. 302, 306 (E.D. Mo. 1992); GTE Sprint Communications Co. v. Downey, 628 F. Supp. 193, 196 (D. Conn. 1986); AT&T Co. v. Delta Communications Corp., 114 F.R.D. 606, 614 (S.D. Miss. 1986).

If it decides to refer some, but not all, of the issues presented by Beehive, the Court should proceed to decide the remaining counts of Beehive's amended counterclaim. See, AT&T Co. v. Eastern Pay Phones, Inc., 767 F. Supp. 1335, 1343 (E.D. Va. 1991).

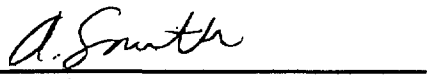
In any event, the injunction already imposed by the Court in this action should be continued in full force and effect. See, Sprint Corp. v. Evans, 846 F. Supp. 1497, 1510 (M.D. Ala. 1994).

CONCLUSION

Beehive believes that it has rebutted the arguments of DSMI on the motion to dismiss. Each and every count of the amended counterclaim states a claim upon which relief may be granted, especially if the complaint is read as a whole and liberally construed. The alternative motion to refer likewise is not well taken. The issues at stake in the amended counterclaim can be resolved by this Court, without recourse to any particular agency expertise. These issues, for the most part, are questions of statutory construction. In many instances, the FCC already has given such agency input as may be helpful to the Court respecting implementation of agency policy. In other instances, the

statute delegates administration of the law to state commissions, making the doctrine of primary jurisdiction inapposite to this case. Certain issues, such as the Fifth Amendment claim of Beehive, surely are beyond the pale of agency adjudication, and should be resolved in this Court, so that the right of trial by jury may be preserved to Beehive. In the event that the Court determines that referral of some of the counts in the amended counterclaim to the FCC is appropriate, Beehive nevertheless believes that, under the cases cited above, bifurcation of the action is within the discretion of the Court, leaving some of the claims for resolution in this forum. In all events, Beehive believes that it is most equitable that the preliminary injunction, already entered, be maintained to preserve the status quo, pending a full and final hearing and outcome before the FCC and/or this Court.

Dated this 11th day of March, 1997.



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CERTIFICATE OF SERVICE

The undersigned certifies that on this 11th day of March, 1997, at approximately 2:30 a.m., Beehive's Response to Motion to Dismiss Amended Counterclaim was served by faxing a copy of the same to Floyd A. Jensen, Ray, Quinney and Nebeker, 79 South Main Street, Suite 700, Salt Lake City, Utah 84111, at 532-7543.

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

DATABASE SERVICE MANAGEMENT, INC., a New Jersey Corporation, Plaintiff, v. BEEHIVE TELEPHONE COMPANY, INC., a Utah Corporation, Defendant.	**REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AMENDED COUNTERCLAIM OR, IN THE ALTERNATIVE, TO REFER CERTAIN CLAIMS TO THE FEDERAL COMMUNICATIONS COMMISSION, AND TO STAY ACTION PENDING REFERRAL** Civil No. 2:96 CV 0188J Judge Bruce S. Jenkins

Plaintiff Database Service Management, Inc. ("DSMI") submits the following memorandum in response to "Beehive's Response to Motion to Dismiss Amended Counterclaim."

TABLE OF CONTENTS

ARGUMENT 1

INTRODUCTION 1

I. COUNT I 1

II. COUNT II 4

III. COUNT III. 5

IV. COUNTS IV AND V. 6

V. COUNT VI. 9

VI. COUNT VII 11

VII. PRIMARY JURISDICTION 12

CONCLUSION 14

ARGUMENT

INTRODUCTION

Beehive continues to treat DSMI as the alter ego of the Bell Operating Companies ("BOCs"), without any legal justification. Beehive argues that DSMI refuses to "restore" specific 800 numbers, but fails to acknowledge that DSMI is under a Court order not to do so.[1] Beehive also argues that DSMI threatens to allocate those numbers to others, although no such allegation appears in the Amended Counterclaim. Such an allegation would be unfounded in any event, because DSMI does not engage in the practice of assigning specific numbers, but simply administers the SMS/800 database, from which any qualified RespOrg, including Beehive, may reserve available numbers simply by accessing the database and entering appropriate keystrokes on a computer, subject to the terms and conditions of the SMS/800 Tariff ("Tariff"). Beehive knows this, but is unwilling to give other RespOrgs an equal opportunity to reserve those numbers.

Beehive's response fails adequately to rebut DSMI's motion to dismiss, as the following will demonstrate.

I. COUNT I

Beehive argues that it is not asking the Court to rule that the Bell Operating Companies ("BOCs") must do anything, and that therefore, the BOCs are not needed for an adjudication of Count I. *See* Beehive Memo. at 6. However, Beehive alleges that "[t]he **BOCs**, as ILECs, have a duty to negotiate with Beehive . . . under 47 U.S.C. sections 251(c)(1) and (3)" and that "[t]he **BOCs** are purporting to provide access to the

[1] At least Beehive finally concedes that the order is indeed a preliminary injunction. *See* Beehive Memo. at 31, 32.

SMS/800 under their SMS/800 Tariff." Am. Countercl. ¶¶ 56, 57 (emphasis added). On that basis, Beehive requests the Court to issue an order "that SMS/800 access must be provided under inter-carrier agreements pursuant to 47 U.S.C. sections 251(c)(3) and 252(a) and (b)." *Id.* ¶ 57.

Although Beehive's use of the passive voice obscures its intent, the context of Count I compels the conclusion that what Beehive is seeking is an order that the **BOCs** must negotiate with Beehive, and that the **BOCs** must enter into inter-carrier agreements with Beehive.[2] Otherwise, Count I is meaningless, because DSMI, the opposing party in this action, is incapable of entering into such an agreement, since it is not a carrier and does not have a duty under 47 U.S.C. § 251(c) to negotiate with telecommunications carriers for the provision of network elements.[3] Therefore, since the entities that could be affected by the requested declaratory judgment are not before the Court, there is no actual controversy; hence the Court lacks jurisdiction to grant relief on Count I.

Beehive argues that an incumbent local exchange carrier ("LEC") must designate a representative with authority to make binding representations in negotiations with requesting carriers, and that DSMI is the BOCs' designated representative. *See* Beehive Memo. at 7.[4] By so arguing, Beehive appears to be

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[2] Further evidence that Beehive seeks declaratory relief against the BOCs lies in the fact that the SMS/800 Tariff, which Beehive claims to be invalid and illegal, was filed by the BOCs, not by DSMI.

[3] As Beehive itself has pointed out, SMS/800 service is available to any person who qualifies as a RespOrg, and such person may or may not be a telecommunications carrier. *See* Am. Countercl., Count III.

[4] Beehive's citation to "47 C.F.R. section 1.301(c)(7)" is incorrect. *See* Beehive Memo. at 7. The correct reference is 47 C.F.R. § 51.301(c)(7), which simply provides that "[r]efusing throughout the negotiation process to designate a representative with authority to make binding representations, if such refusal significantly delays resolution of issues," if proven, violates the duty of an incumbent LEC to negotiate in good faith.

seeking to raise the inference that DSMI is the BOCs' alter ego for purposes of Count I. However, no such allegation appears in the Amended Counterclaim, and there is no factual basis for such an argument. The fact that DSMI is the BOCs' agent for administration of the Tariff does not mean that it is the BOCs' agent for negotiation of an intercarrier agreement for the provision of access to the SMS/800 system.

The futility of Count I is easily demonstrated by considering the consequences if the Court were to grant the relief requested. In that event, there would be a declaratory ruling that the BOCs must negotiate with Beehive for provision of SMS/800 access, yet it would not be enforceable against DSMI, which is not a BOC, nor against the BOCs, which are not parties. It would be an advisory opinion only. Furthermore, it would not be res judicata or constitute collateral estoppel against the BOCs, because they are not parties to this action.[5] *See, e.g.*, Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329-30, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971) (a litigant who did not appear in the prior proceeding may not be collaterally estopped). Accordingly, Count I does not state a claim upon which relief can be granted.

It now appears that Beehive's real purpose in Count I is to collaterally attack the validity of the Tariff. *See* Beehive Memo. at 6 ("The ruling effectively will invalidate the SMS/800 Tariff . . . ."). However, Beehive already elected its remedy by challenging the Tariff before the FCC. *See* In the Matter of Beehive Tel., Inc., v. The Bell Operating Companies, 10 F.C.C.R. 10562 (1995) (copy attached as Exhibit C to DSMI's May 1, 1996 Memorandum in Opposition to Beehive's Motion to Dismiss

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[5] Elsewhere in its brief, Beehive suggests that the BOCs should be made parties to the case. *See* Beehive Memo. at 13. However, Beehive has filed no motion to do so.

Complaint). It is not permitted to relitigate the validity of the Tariff in this Court. *See* 47 U.S.C. § 207[6]; Cincinnati Bell Tel. Co. v. Allnet Comm. Servs., Inc., 17 F.3d 921, 923 (6th Cir. 1994) (pursuit of claim before FCC that charges were unreasonable barred counterclaim for refund of charges in collection lawsuit). Therefore, the Court must dismiss Count I.

II. COUNT II

Beehive claims that a declaratory judgment that DSMI is not an "impartial" entity for purposes of 47 U.S.C. § 251(e)(1) would not infringe on the FCC's statutory duty to select an impartial entity. *See* Beehive Memo. at 8. However, disqualification of DSMI by the Court would effectively prevent the FCC from reaching a contrary conclusion—that DSMI is indeed an "impartial" entity—and would remove DSMI as a candidate for the FCC's consideration. Given the facts that DSMI is the incumbent administrator of the SMS/800 system, and that the FCC has not seen fit to declare DSMI unqualified to serve in that capacity, a declaration by the Court that DSMI is unqualified would clearly encroach on the FCC's prerogative to select an administrator.

Beehive confuses the Court's jurisdiction to interpret a statute delegating power to an administrative agency with its *lack* of jurisdiction to perform an agency

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[6] 47 U.S.C. § 207 provides:

> Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; **but such person shall not have the right to pursue both such remedies.**

[emphasis added]

function. Even assuming that the Court has the power to declare the meaning of the term "impartial entity," that does not mean that it has the power to determine whether DSMI fits the definition, because that latter function has been specifically delegated to the FCC. Therefore, Count II must be dismissed.

If Beehive believes that the FCC has improperly failed to appoint an impartial administrator for the SMS/800 system, the proper remedy would be to bring a mandamus action to compel the FCC to do its duty. Beehive should not be permitted to achieve the same result in this action, where the FCC is not present to defend itself.[7]

III. COUNT III.

As with Count I, Count III is a collateral attack on the Tariff,[8] and Beehive is precluded from mounting such an attack because it elected its remedy in the FCC. *See* 47 U.S.C. § 207; Cincinnati Bell Tel. Co. v. Allnet Comm. Servs., Inc., 17 F.3d 921, 923 (6th Cir. 1994). Therefore, the Court must dismiss Count III.

Even if Count III were not barred by the election of remedies doctrine, Beehive has still failed to allege facts sufficient for a finding of actual controversy, because the Amended Counterclaim has not alleged how Beehive is injured from the collection of tariff administration costs from non-telecommunications carriers. In its

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[7] In arguing that DSMI is unqualified to be the SMS/800 administrator, Beehive is hoist on its own petard. It wants the Court to require DSMI "to restore the '800' numbers previously taken from Beehive," [Beehive Memo. at 9] , yet if Beehive were found not qualified to administer the SMS/800 system, it would have no more authority to "restore" the numbers than it did to take them away. Such a function would have to be performed by a qualified administrator, and Beehive would just have to wait for the FCC to name such an impartial entity.

[8] *See* Beehive Memo. at 9-10 ("Beehive's third Telecom Act count challenges the legal effectiveness of the SMS/800 Tariff as the means to recover the costs of administering '800' numbers.")

Memorandum, Beehive claims that the Tariff illegally permits recovery of administration costs from non-telecommunications carriers, because, according to Beehive's strained interpretation, 47 U.S.C. § 252(e)(2) permits costs to be recovered only from telecommunications carriers. *See* Beehive Memo. at 10. Beehive's spurious argument extrapolates from that dubious beginning to the implied conclusion that the Tariff was invalid ab initio, and that therefore, all charges paid pursuant to it must be refunded. *See id.* In essence, Beehive wants free SMS/800 service, not just a declaration that non-telecommunications carriers should not bear any of the costs of administration. *See* Am. Counterclaim ¶ 69.

Beehive claims that "[t]here certainly is a causal connection between the level of Beehive's payments and the fact that '800' number administrative costs have not been allocated as required under section 251(e)(2)." Beehive Memo. at 10. Beehive fails to mention, however, that the causal connection is that Beehive's payments are **necessarily lower** than they would be if costs were recovered only from telecommunications carriers, as Beehive claims the 1996 Act requires.[9] Thus Beehive has alleged no injury to itself from the practice of collecting administration costs from non-telecommunications carriers. Under these circumstances, Beehive has not stated sufficient facts to allege standing, and Count III must be dismissed.

IV. COUNTS IV AND V.

Beehive makes a strained attempt to argue that DSMI is liable under the 1934 and 1996 Acts, but cannot overcome the fact that DSMI is not a common carrier nor an incumbent LEC.

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[9] It should be noted that the $7,500 per month that Beehive was required to pay under the SMS/800 tariff represents charges that were incurred prior to passage of the 1996 Act.

Beehive first argues that DSMI has a duty to negotiate under 47 U.S.C. § 251(c), because DSMI "assumed that duty under section 217 of the Act." Beehive Memo. at 12. However, Beehive fails to perceive an important distinction, that Section 217 makes common carriers liable for the acts of their agents, but does not extend common carrier liability to non-common carrier agents. *See, e.g.,* Allnet Communication Service, Inc. v. National Exchange Carrier Association, Inc., 741 F. Supp. 983 (D.D.C. 1990), *aff'd,* 965 F.2d 1118 (D.C. Cir. 1992); American Sharecom, Inc. v. Southern Bell Tel. & Tel. Co., 1989 WL 229397 (D.D.C. 1989); In the Matter of Communique Telecommunications, Inc., 10 F.C.C. Rcd. 10399 (1995). In Communique, the FCC held that Section 217 did not preclude the National Exchange Carrier Association's ability to file tariffs as agent of its member LECs:

> We find no basis for Communique's assertion that Section 217 reflects a congressional intent to restrict the activities of carriers' agents and that Section 203 and Section 217 preclude NECA from acting as agent for its member companies by developing tariffs and billing and collecting funds pursuant to those tariffs.

This holding undercuts Beehive's argument that Section 217 makes DSMI a common carrier because it acts as agent for the BOCs.

Beehive next argues that DSMI is a common carrier because it provides SMS/800 access service, which the FCC has held to be a common carrier service. *See* Beehive Memo. at 13-15. However, to be a common carrier, one must be "engaged as a common carrier for hire, in interstate or foreign communication by wire or radio." 47 U.S.C. § 153(h). *See* National Association of Regulatory Utility Commissioners v. Federal Com. Comm'n, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (key feature of communications common carriage is that the service provider undertakes to provide

service indifferently to all potential customers and transmission service enables customer to "transmit intelligence of his own design and choosing."). The Amended Counterclaim does not even allege that DSMI provides wire or radio communication for hire, nor that DSMI is a common carrier. DSMI's function is to administer access to a computer database, pursuant to the Tariff filed by the BOCs. DSMI does not operate the SMS/800 system on its own account, nor does it profit thereby. Similarly, DSMI does not provide 800 service to any member of the public—that function is performed by carriers such as Beehive. Once again, Beehive suffers from a case of mistaken identity. Any claims under the 1934 or 1996 Acts must lie, if at all, against the BOCs, not against DSMI.

Beehive argues that because DSMI maintains its own accounting records relating to SMS/800 service, it must be a common carrier. *See* Beehive Memo. at 14. However, Beehive fails to note the significance of the fact that DSMI operates on a non-profit, pass-through basis. If DSMI were a common carrier, it would be constitutionally entitled to the opportunity to earn a reasonable return on its investment. *See* Duquesne Light Co. v. Barasch, 109 S.Ct. 609, 102 L.Ed. 2d 646 (1989); Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944). Because it is not a common carrier, but merely the agent for the BOCs, it may not retain any profits from the provision of SMS/800 service. *See* In the Matter of BOC Petition for Waiver to Allow DSMI to Account for Toll Free Database Services, 1997 WL 54842 (F.C.C., Feb. 12, 1997) ("DSMI Accounting Order"). This is compelling evidence that DSMI is not a common carrier. Notably, in the DSMI Accounting Order, the FCC did not hold that DSMI is a common carrier; rather, for reasons of

efficient administration, the FCC granted the *BOCs'* petition to waive the requirement that each of them maintain separate accounting records for SMS/800 services, because the service was offered pursuant to a joint tariff.

Counts IV and V, which seek to hold DSMI liable for violations of the 1934 Act or the 1996 Act, depend on a threshold finding that DSMI is a common carrier (for purposes of Sections 201 and 202 of the 1934 Act) or an incumbent LEC (for purposes of Section 251 of the 1996 Act). However, DSMI is neither a common carrier nor an incumbent LEC. *See* DSMI's principal memorandum at 2-8. Therefore, Counts IV and IV fail to state a claim against DSMI upon which relief can be granted.

As an independent basis for dismissing Counts IV and V, Beehive is barred from asserting violations of the 1934 Act, because it elected its remedy by asserting violations of that Act in its action before the FCC. *See* 47 U.S.C. § 207; Cincinnati Bell Tel. Co. v. Allnet Comm. Servs., Inc., 17 F.3d 921, 923 (6th Cir. 1994). Therefore, the Court must dismiss Counts IV and V.

V. COUNT VI.

Beehive argues that DSMI violated the Tariff by "repossessing" the 800 numbers that had previously been assigned to Beehive. *See* Beehive Memo. at 16. However, neither in the Amended Counterclaim nor in its brief does Beehive cite or quote the Tariff provision that was allegedly violated. Instead, Beehive asserts that the Tariff requires notice, good faith negotiations, and an opportunity for a hearing before DSMI may unilaterally disable the use of 800 numbers. *See* Beehive Memo. at 16-17. DSMI is aware of no provision of the Tariff that requires notice, hearing, or

negotiations as conditions for the disconnection of 800 numbers.[10]

Section 2.1.8 of the Tariff (copy attached) permits DSMI to reallocate an 800 number subscriber's account to a new RespOrg in the event that a RespOrg is denied SMS/800 service and the subscriber fails to choose a new RespOrg. That is precisely what happened here. Beehive lost its RespOrg status when it refused to pay the Tariff charges, and refused to notify its subscribers to choose a new RespOrg. Accordingly, DSMI proceeded to take steps to reallocate the 800 numbers to other RespOrgs, which required temporary disconnection of those numbers. The Tariff does not require notice or a hearing for such action.

Since Beehive has been unwilling or unable to point out the Tariff provisions upon which it relies for its allegations of Tariff violation, the Court must conclude that Count VI fails to state a claim against DSMI upon which relief can be granted.[11]

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[10] Beehive may have in mind Section 2.4.1(1) of the Tariff (copy attached), which provides:

> In case of disputes regarding billing rendered by the Company, the Resp Org shall pay the undisputed amount in accordance with the provisions of (D) preceding and shall immediately thereafter negotiate in good faith with the Company a resolution of the amount in dispute. When the dispute is resolved, the Resp Org or the Company, whichever is applicable shall pay to the other the amount determined to be properly due and owing, together with interest form the original date. Such interest shall be calculated in the manner specified in (D) preceding.

This tariff provision requires a **RespOrg** to pay any amounts in dispute and then to negotiate in good faith. Beehive did neither. It refused to pay any amount, and instead of negotiating in good faith, filed actions with the F.C.C. challenging the SMS/800 Tariff. In any event, there is no provision in the Tariff for notice and hearing preceding disconnection of 800 numbers for non-payment.

[11] In any event, as with Counts I and III, to the extent that Count VI constitutes a challenge to the Tariff, Beehive is barred from pursuing such a claim, because it elected its remedy by filing its action with the FCC challenging the validity of the Tariff. *See* 47 U.S.C. § 207; Cincinnati Bell Tel. Co. v. Allnet Comm. Servs., Inc., 17 F.3d 921, 923 (6th Cir. 1994). Therefore, the Court must dismiss Count VI.

Furthermore, Beehive's action before the FCC sought restoral of the same numbers that it seeks in this action. Therefore, its claim for restoral of 800 numbers also fails by virtue of the doctrine of election of remedies.

VI. COUNT VII

In arguing that it has sufficiently alleged state action, Beehive relies on Public Util. Comm'n v. Pollack, 343 U.S. 451 (1951), but fails to mention or attempt to distinguish the more recent United States Supreme Court opinion, which is more on point, namely Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350, 354 (1974). Jackson specifically held that no state action occurs when a privately owned utility exercises rights under a tariff to disconnect service for non-payment.[12] DSMI submits that Jackson is controlling on the issue of state action; hence it is not necessary to respond to Beehive's remaining constitutional arguments. *See also*, Teleco, Inc. v. Southwestern Bell Tel. Co., 511 F.2d 949, 951-52 (10th Cir. 1975); Occhino v. Northwestern Bell Tel. Co., 675 F.2d 220, 224-25 (8th Cir. 1982).

VII. PRIMARY JURISDICTION

Beehive has come full circle on whether its claims should be resolved by this

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[12] In Jackson, the Court stated:

> The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. Approval by a state utility commission of such a request from a regulated utility, where the commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the commission into "state action."
>
> . . . .
>
> All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utility Commission found permissible under state law. Under our decision this is not sufficient to connect the State of Pennsylvania with respondent's action so as to make the latter's conduct attributable to the State for purposes of the Fourteenth Amendment.

419 U.S. at 357-58. In the present case, there is no allegation or evidence that the FCC ordered DSMI to disconnect the 800 numbers that had previously been assigned to Beehive. Therefore, Beehive cannot argue that the government "put its own weight on the side of the proposed practice by ordering it."

Court or by the FCC.[13] Now Beehive argues that its claims should be decided by the Court because they do not involve issues of tariff interpretation, and the Court is more capable than the FCC of interpreting the 1996 Act. *See* Beehive Memo. at 25-26.[14]

DSMI agrees that the Court may resolve most, if not all, of the issues raised by the Amended Counterclaim, but not in the way Beehive wants. The Court should dismiss the various counts of the Amended Counterclaim as a matter of law, for the reasons stated above and in DSMI's principal brief.

Beehive claims that the statutes are so clear that no assistance from the FCC is required to interpret and implement them, or that the FCC has already construed the applicable provisions, and does not need to do so again. *See* Beehive Memo. at 26. For example, Beehive claims that it is beyond dispute that SMS/800 service is a "network element" and that as such, it cannot be provided under tariff, but must be offered pursuant to negotiated intercarrier agreements *Id.* at 26-27. However, Beehive fails to quote the provisions on which it relies. Those provisions do not stand for the proposition for which they were cited. For example, Beehive cites 47 C.F.R. §§ 51.301, 51.307, and 51.319. *Id.* at 26. Those provisions apply expressly to obligations of incumbent LECs, but do not resolve the issue whether DSMI is deemed to be an incumbent LEC, which is a critical issue in this case.

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[13] *See* Defendant's Status Conference Report dated January 10, 1997, in which Beehive urged the Court to refer this case to the FCC.

[14] Beehive has undoubtedly realized that the FCC would likely reject most if not all of the claims asserted in its Amended Counterclaim, because the FCC has already disposed of Beehive's challenges to the Tariff, rejected its claims of violation of the 1934 Act, and refused to order restoral of the 800 numbers that Beehive is seeking in this case. *See* Beehive Tel. Co., Inc. v. The Bell Operating Companies, 10 F.C.C.R. 10562 (1995).

Beehive also claims that referral to the FCC is inappropriate because "the FCC lacks primary jurisdiction under sections 251 and 252 of the Telecom Act." Beehive Memo. at 27. Instead, Beehive argues that the 1996 Act delegated primary jurisdiction to state utility commissions to resolve disputes concerning agreements for network elements. *Id.* Beehive offers no support for its position. On the other hand, in Total Telecommunications Services, Inc. v. American Tel. & Tel. Co., 919 F. Supp. 472, 477-82 (D.D.C.),*aff'd,* 99 F.3d 448 (D.C. Cir. 1996), the court referred a case to the FCC in circumstances strikingly analogous to this case, where AT&T had discontinued service to the plaintiff, and the plaintiff had claimed violations of the 1934 Act, as well as of the 1996 Act. The Court stated:

> The resolution of these issues involve policy considerations concerning the public interest and technical questions relating to TTS's tariff and operating structure, that the Communications Act has vested the FCC with the mandate to determine. . . . [The FCC's] supervisory powers extend to a carrier's "charges, practices, classifications, and regulations." . . . .
>
> As a result of the Commission's mandate and pursuant to the primary jurisdiction doctrine, the FCC is the entity best suited to make the initial determination of the issues presently before the court. . . .
>
> The agency's expertise is not limited to technical matters, but extends to the agency's mandate to implement, in this case the Telecommunications Acts of 1934 and 1996, and the concomitant policy judgments it must make. . . . Were the district courts to make the initial determinations of the issues involved in this case, one of the premises of primary jurisdiction could be infringed. That is, different courts may resolve the regulatory issues before them in an inconsistent manner thereby producing disparate results.

Id. at 478 (citations omitted)

This case presents the same kinds of issues, including interpretation of the 1996 Act, that the court in Total Telecommunications held to be appropriate for resolution by the FCC. Accordingly, if the case not resolved on this motion to